No. 97-8214
A-___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

ANGEL FRANCISCO BREARD,

Petitioner

v.

FRED W. GREENE, WARDEN,

Respondent

Supreme Court, U.S.
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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Where it is undisputed that petitioner murdered Ruth Dickie more than six years ago, should this Court grant a stay of execution to review a treaty-based claim that petitioner admits he never raised in state court and which both the court of appeals and the district court found barred by his procedural default?

II. Should this Court grant a stay to review a procedurally defaulted claim about the adequacy of the Virginia Supreme Court's "proportionality review" on direct appeal, especially where such a claim, even if it had been preserved, would fail to raise a cognizable federal issue?

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STATEMENT OF THE CASE

It is undisputed that Breard sexually assaulted and murdered Ruth Dickie in her Arlington County apartment in February of 1992. The Virginia Supreme Court found as follows regarding the facts of the offense:

> In February 1992, the victim, Ruth Dickie, resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County. She was 39 years of age and unmarried. Breard was living in an apartment a short distance from Dickie's apartment.
>
> About 10:00 or 10:15 p.m. on February 17, 1992, Dickie left an Arlington restaurant. About 10:30 or 10:45 p.m., Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. Isch heard Dickie say, "[K]eep your hands off me." According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, when everything became quiet, Isch called the apartment complex maintenance man.
>
> Upon receiving Isch's call, the maintenance man, Joseph King, went to Dickie's apartment. King knocked on the apartment door and heard "something that sounded like something being drug across the floor." After receiving no response to his knocking, King called the police.
>
> When the police arrived, King gave them a master key. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread wide. She was bleeding profusely and did not appear to be breathing.
>
> The police observed a "shiny...dried...body fluid" on Dickie's pubic hair and on her inner thigh. Hairs were found clutched in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. The police found Dickie's eyeglasses, without one lens, in the living room, and the missing lens was found under her body. A telephone receiver located near her head was covered with blood. In the room where Dickie's body was found, the police also found her shoes and her pants with some buttons missing. Dickie's purse was on the floor just inside the front door, and her set of keys was on the floor between her legs.
>
> An autopsy revealed that Dickie had sustained five stab wounds to the neck. Two of the wounds would have caused her death.
>
> The body fluid found on Dickie's pubic hair and inner thigh was subjected to a serological examination and identified as semen. No semen was detected on vaginal or anal swabs.

> In the course of their investigation, the police obtained a sample of Breard's blood and samples of his head and pubic hair. The hair samples were subjected to microscopic examination, and the blood sample was subjected to enzyme testing and DNA analysis.
>
> The foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to the hair samples taken from Breard. The hairs found clutched in Dickie's hand were Caucasian hairs "microscopically like" Dickie's own head hair and bore evidence that they had been pulled from her head by the roots. The semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects. On all five of the genetic probes used in the DNA testing, Breard's DNA profile matched the DNA profile of the semen found on Dickie's body.
>
> Breard is a native of Argentina, and his DNA profile occurs in only one in seventeen million members of the Hispanic population. Only 1.7% of the general population has Breard's enzyme typing.
>
> At trial, Breard testified in his own defense. He stated that, on the night of February 17, 1992, he left his apartment armed with a knife because he thought he would "try to do someone," meaning that he "wanted to use the knife to force a woman to have sex with [him]." Breard admitted that he engaged Dickie in conversation on the street, followed her to her apartment, argued with her, and forced himself into her apartment. Breard also admitted that he stabbed Dickie, removed her pants, and got "on top of her." While he was on Dickie, he heard someone knocking on the door. He "got scared," opened a kitchen window, jumped to the ground, and fled. Breard also testified that, at the time, he believed that he was under a curse placed upon him by his ex-wife's father.

Breard v. Commonwealth, 248 Va. 68, 72-73, 445 S.E.2d 670, 673-674 (1994). See 28 U.S.C. § 2254(e)(1) (state court finding of fact must be presumed correct and petitioner may overcome presumption only by clear and convincing evidence); Sumner v. Mata, 449 U.S. 539, 541-549 (1981) (statutory presumption of correctness applies to state appellate court's recitation of historical facts).

With respect to the evidence warranting Breard's death penalty, the Virginia Supreme Court found as follows:

> In the penalty phase of the trial, the Commonwealth presented evidence that Breard had attacked two other women. Approximately three weeks before Breard murdered Dickie, he attacked Celia Gonzales on a street in Arlington County. He grabbed Gonzales from behind, ordered her to accompany him, and told her that he had

> a gun. Breard ultimately released Gonzales after he had been observed by a man sitting in a nearby parked car. Before leaving, Breard told Gonzales that he knew where she lived and that he "[had] someone who's going to get [her] later."
>
> On August 17, 1992, six months after Dickie's murder, Breard attempted to sexually assault Jeanine Yvonna Price. Breard and Price had met in Washington, D.C., and the two traveled, in Breard's automobile, to Breard's Arlington apartment.
>
> At the apartment, Breard began kissing Price "all over." Price resisted, but Breard pulled her to the floor, sat on her stomach, and started to remove her clothing. Eventually, he removed all of her clothing and started to remove his pants.
>
> Price began screaming for help, and Breard responded by hitting her in the face and ordering her to be quiet. Breard attempted to tie Price's hands with a telephone cord and told her that he intended to have anal intercourse with her.
>
> A man in a nearby apartment heard Price's screams and called the police. When the police arrived, they found Price, naked and hysterical, and Breard clad only in his undershorts. Breard was arrested and, at that time, became a suspect in Dickie's murder.

Breard, 248 Va. at 85, 445 S.E.2d at 680. See § 2254(e)(1); Sumner v. Mata.

Breard was arrested in August of 1992. There is no evidence that he was advised by the arresting authorities that he could contact the consulate of a foreign country; nor is there any evidence that he sought to make such contact. ***It is undisputed, however, that the state court promptly appointed two attorneys to represent Breard, that those attorneys represented Breard throughout the trial court proceedings and on direct appeal, and that they were free to contact whomever they saw fit.***

On June 24, 1993, after a 3½ day trial, a jury in the Circuit Court of Arlington County, Virginia, convicted Breard of capital murder and attempted rape of Ruth Dickie. The jury fixed Breard's punishment for the attempted rape at 10 years imprisonment and a fine of $100,000.

The trial court conducted a separate sentencing proceeding on June 24-25, 1993. After considering all the evidence in aggravation and mitigation, the jury sentenced Breard to death for the capital offense, finding that he represented a continuing serious threat to society ***and*** that his

offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. See Va. Code § 19.2-264.4.

The trial judge conducted yet another sentencing proceeding on September 9, 1993, at which the court considered additional evidence introduced on Breard's behalf. At the conclusion of that hearing, however, the court imposed final judgment in accordance with the jury's verdicts.

On appeal, Breard did not raise any claim alleging a violation of the Vienna Convention on Consular Relations ("Vienna Convention"). Breard's convictions and sentences were affirmed by the Supreme Court of Virginia on June 10, 1994. Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994). This Court denied Breard's certiorari petition on October 31, 1994, thus marking the end of his direct appeal. Breard v. Virginia, 513 U.S. 971 (1994).

On October 24, 1994, the Circuit Court of Arlington County appointed counsel to represent Breard in his state habeas corpus proceedings. See Va. Code § 19.2-163.7. Breard filed his state petition on May 1, 1995. The petition raised no claim alleging a violation of the Vienna Convention. The Circuit Court dismissed the petition on June 29, 1995. Breard subsequently filed a motion to reconsider, which the state court denied on July 24, 1995.

Breard then filed a petition for appeal in the Virginia Supreme Court on September 28, 1995. On October 11, 1995, however, the Virginia Supreme Court granted Breard's request to file an amended petition for appeal, which he filed on October 30, 1995. Once again, Breard raised no claim that the Vienna Convention had been violated. The state court refused the amended petition for appeal on January 17, 1996. Breard's petition for rehearing was denied on March 1, 1996.

On March 19, 1996, the state trial court scheduled Breard's execution for May 2, 1996. On April 29, 1996, however, the United States District Court for the Eastern District of Virginia granted Breard's request for a stay of execution and on May 2, 1996, appointed ***five*** attorneys to represent Breard in his federal habeas proceedings. The district court initially directed Breard to file his federal petition on or before July 1, 1996. On June 19, 1996, however, the court extended

the filing deadline until August 30, 1996. Breard filed his petition on August 30. In that petition, Breard for the first time claimed that his conviction and sentence should be overturned because of an alleged violation of the Vienna Convention.

The district court heard oral argument on November 26, 1996. On November 27, the court dismissed Breard's petition, finding that most of his claims – including the "Vienna Convention" claim – were procedurally defaulted and barred from federal collateral review. Breard v. Netherland, 949 F. Supp. 1255, 1263-1269 (E.D. Va. 1996).

Breard appealed to the United States Court of Appeals for the Fourth Circuit, which heard oral argument on October 1, 1997. On January 22, 1998, the Court of Appeals affirmed the denial of federal habeas relief, specifically finding that Breard's "Vienna Convention" claim was barred by his procedural default. Breard v. Pruett, 134 F.3d 615, 618-620 (4th Cir. 1998). The Fourth Circuit denied Breard's petition for rehearing on February 18, 1998, with no judge requesting a poll on the suggestion for rehearing en banc.

Pursuant to Virginia Code § 53.1-232.1, the state trial court then scheduled Breard's execution for April 14, 1998. Breard has not yet asked the Fourth Circuit for a stay of execution.

REASONS WHY THE WRIT AND A STAY SHOULD BE DENIED

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A TREATY-BASED CLAIM THAT PETITIONER NEVER RAISED IN STATE COURT, WHICH BOTH LOWER COURTS RULED BARRED BY HIS PROCEDURAL DEFAULT, AND WHICH CLEARLY WOULD BE BARRED BY THE NEW RULE DOCTRINE EVEN IF IT WERE NOT DEFAULTED.

A. Procedural Default:

It is undisputed that Breard never raised his "Vienna Convention" claim in state court. His failure to raise the claim in state court bars federal collateral relief. See Gray v. Netherland, 116 S.Ct. 2074, 2080-2081 (1996). Breard already has litigated a state habeas petition and his claim undoubtedly now would be barred if he attempted to raise it in state court. See Va. Code §§ 8.01-654(B)(2) (prohibiting claims that could have been raised in a prior petition); 8.01-654.1 (limiting death row prisoners to one habeas petition). The "independent and adequate state ground doctrine" precludes federal collateral relief under such circumstances. See Coleman v. Thompson, 501 U.S. 722, 731-732 (1991), citing Engle v. Isaac, 456 U.S. 107, 125-126 n.28 (1982).

Breard's contention that the procedural default doctrine does not even apply to treaty-based claims (Ptn. 15-20) is precluded by Coleman which makes the doctrine applicable in "***all*** cases in which a state prisoner has defaulted his federal claims in state court." See 501 U.S. at 750 (emphasis added). It would make no sense, moreover, to hold, as this Court frequently has done, that claims based upon specific ***constitutional*** provisions may be defaulted, see, e.g., Gray v. Netherland, 116 S.Ct. at 2080-2081 (due process "Brady" claim barred by default), but that treaty-based claims may not. Indeed, the procedural default doctrine is now firmly established in our law, and Article 36(2) of the Vienna Convention expressly provides that the "rights" conferred by the treaty "shall be exercised in conformity with the laws and regulations of the

receiving State." (Resp. App. 2). Article 36(2)'s proviso that the law of the receiving state "must ***enable*** full effect to be given to the purpose [of the Article]" (emphasis added) is thus perfectly consistent with the default doctrine that generally "enables" a § 2254 prisoner to raise a claim if he raised it properly in state court.

In order to avoid his procedural default, Breard must show both "cause" and "prejudice." The Fourth Circuit applied these well-settled principles to the facts of Breard's case and concluded that he had not shown the required "cause" for his default.[1] See Breard, 134 F.3d at 620. The Court of Appeals' opinion listed the cases that existed when Breard filed his state habeas petition in May of 1995 which would have provided support for a claim that he was entitled to relief due to the State's alleged failure to notify him of his right to consular assistance pursuant to the Vienna Convention. Id. Because the "tools" to construct his claims were available at a time when the claims could have been raised in state court, Breard clearly cannot show "cause" for his default. See Engle, 456 U.S. at 133 ("we cannot say that respondents lacked the tools to construct their constitutional claim").

Breard's assertion of "novelty" as "cause" (Ptn. 20-21) cannot possibly get him anywhere because, in light of the "new rule" doctrine (see Argument B, below), an invocation of "novelty" does nothing other than "plead the petitioner out of court." See Gacy v. Welborn, 994 F.2d 305, 311 (7th Cir.), cert. denied, 510 U.S. 899 (1993). ***The assertion of "novelty" also is belied by the fact that, when he raised his "Vienna Convention" claim in the district court, Breard alleged that his trial and state habeas attorneys had been ineffective in failing to raise the claim.*** (Ptn. App. 158-160). Obviously, Breard's ineffective counsel allegation implicitly

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[1] The Court of Appeals also correctly concluded that, in view of Breard's undisputed guilt and eligibility for a death sentence under Virginia law, his case clearly does not fall within the "miscarriage of justice" exception to the default doctrine. Breard, 134 F.3d at 620.

acknowledged that prior counsel had the legal and factual means to have raised the claim. Breard now expediently argues exactly the opposite. (Ptn. 21).

The Fourth Circuit's routine analysis of Breard's defaulted claim – which never was raised in state court – certainly does not warrant this Court's review. See generally U.S.S.Ct. Rule 10 ("certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law"). This Court, moreover, recently has denied petitions and requests for stays of execution in cases where Virginia and Texas prisoners were attempting to litigate defaulted "Vienna Convention" claims. See Murphy v. Netherland, 118 S.Ct. 26 (1997) (stay and certiorari denied); [2] In Re Irineo Tristan Montoya, 117 S.Ct. 2476 (1997) (stay and habeas petition denied). The Court should do the same here. See generally Bowersox v. Williams, 116 S.Ct. 1312 (1996) (defaulted claims not raised in prior petition cannot justify a stay); Delo v. Stokes, 495 U.S. 320

[2] Indeed, Murphy's "Questions Presented" regarding the "Vienna Convention" claim were substantially the same as Breard's. (Resp. App. 3-4).

(1990) (same); see also McCleskey v. Zant, 467 U.S. 467, 490 (1991) (equating principles of procedural default and abuse of writ).[3]

B. New Rule:

No court in this country ever has held that an alleged violation of the Vienna Convention may serve as a basis for overturning a state prisoner's conviction or sentence. Announcing such a novel, far-reaching rule in this federal collateral proceeding, therefore, would be barred by the "new rule" doctrine even if Breard's claim were not defaulted. See generally O'Dell v. Netherland, 117 S.Ct. 1969, 1973 (1997) (federal collateral relief is precluded "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court"); Lambrix v. Singletary, 117 S.Ct. 1517, 1525 (1997) ("our first and principal task is...to determine... whether...the unlawfulness

[3] Breard suggests that a "Vienna Convention" violation constitutes a "structural error" which is immune from a "prejudice" analysis. (Ptn. 22). This suggestion, however, mistakenly confuses "harmless error" analysis with "prejudice" under the "cause and prejudice" standard. When a claim such as Breard's is so clearly defaulted because he never raised it in state court, it is ***his*** burden to prove "prejudice," and even the "prejudice" inquiry is superfluous in the absence of a showing of "cause." See Smith v. Murray, 477 U.S. 527, 533 (1986). Even if Breard could show "cause," he cannot sustain his burden of showing "prejudice" because none of the facts upon which he bases his allegation ever was presented to the state courts. See Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-13 (1992); § 2254(e)(2). Moreover, his trial counsel's affidavit that was made a part of the record during the state habeas proceedings clearly shows that counsel had no difficulty obtaining and presenting mitigating evidence related to Breard's background in South America. (Ptn. App. 195-197, 201). Breard's speculation about whether his trial counsel ultimately could have secured a plea agreement ***if*** Breard had been willing to plead guilty is too tenuous to support an affirmative showing of "prejudice." The undisputed facts are that Breard's trial attorneys urged him to plead guilty, and Breard adamantly refused to do so and insisted upon a jury trial. (Ptn. App. 195, 201, 202.01-202.02).

of Lambrix's conviction was apparent to all reasonable jurists" at the time the conviction became final); Teague v. Lane, 489 U.S. 288 (1989).[4]

C. No Individually Enforceable Rights:

The preamble to the Vienna Convention specifically states that the signing nations "have agreed" to the Convention "[r]ealizing that the purpose of such privileges and immunities ***is not to benefit individuals*** but to ensure the efficient performance of functions by consular posts on behalf of their respective states." (Resp. App. 1, emphasis added). Notably absent from the Vienna Convention is any prescribed mechanism, judicial or otherwise, for the enforcement of individual rights.

Given that the Vienna Convention expressly was not intended to "benefit individuals," it simply cannot be concluded that the "rights" afforded under the Vienna Convention are individual rights, enforceable by a state prisoner in a federal habeas proceeding under § 2254. Instead, an alleged failure to comply with the treaty is an issue that properly may be addressed only by the executive branch of the federal government through negotiations with a signatory nation. Even then, however, such negotiations could not mandate relief for a state prisoner from a valid conviction or sentence.

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[4] A claimed treaty violation such as Breard's would be incapable of supporting federal collateral relief, even if there were no "new rule" doctrine. See Reed v. Farley, 513 U.S. 339, 348 (1994) (opinion of Ginsburg, J.) (mere violation of federal statute may support § 2254 relief only if it qualifies as a "fundamental defect which inherently results in a complete miscarriage of justice"); id. at 359 (Scalia, J., concurring) (mere violation of federal statute incapable of supporting § 2254 relief, so long as "full and fair opportunity" to raise claim in state court); see also Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (treaty must "be regarded . . . as equivalent to an Act of the Legislature"). Whatever else one might think about Breard's "Vienna Convention" claim, it certainly does not constitute a "fundamental defect" or a "complete miscarriage of justice," and he and his prior attorneys clearly had a full and fair opportunity to raise the claim in state court.

II. BREARD'S "PROPORTIONALITY REVIEW" CLAIM IS DEFAULTED AND FAILS TO RAISE A COGNIZABLE FEDERAL ISSUE.

Petitioner simply is wrong when he asserts that the Fourth Circuit "declined" to address his "proportionality review" claim. (Ptn. 27). The Court of Appeals addressed the claim, but expressly held that the claim was defaulted because it was raised on direct appeal "only as a state law claim" and because the Virginia Supreme Court expressly applied its default rule when Breard first attempted to "federalize" the claim during the state habeas proceedings.[5] Breard, 134 F.3d at 621. The Fourth Circuit went on to hold that Breard had failed to establish "cause" for the default and that no "miscarriage of justice" would result from a failure to reach the merits of the claim. Id.

Even if Breard's claim were not defaulted, however, it hardly would warrant the granting of certiorari or a stay of execution. Breard argues that, in conducting its review on direct appeal, the Virginia Supreme Court failed to adhere to what Breard says are the requirements of Virginia Code § 17-110.1. (Ptn. 26). The fact of the matter, however, is that on direct appeal the Virginia Supreme Court expressly stated that it had conducted the proportionality review required by the state statute and concluded "that Breard's death sentence is not excessive or disproportionate." See Breard, 248 Va. at 89, 445 S.E.2d at 682.

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[5] Breard thus is wrong when he asserts that the Court of Appeals' denial of his rehearing petition somehow supports the conclusion that the court below failed to address his claim. (Ptn. 27). In view of the express holding in the Fourth Circuit's published opinion, the summary denial of rehearing must be read as a rejection of Breard's contention that the panel had ignored his claim.

It is elementary that the Virginia Supreme Court is the final arbiter of the requirements of state law. See Wainwright v. Goode, 464 U.S. 78, 84 (1984). This Court clearly does not have jurisdiction to grant certiorari to review matters of state law.[6] See Michigan v. Long, 463 U.S. 1032, 1038 (1983).

Finally, it is nothing short of folly for Breard to suggest that his death sentence is in any sense "disproportionate" to the indescribable violence which he inflicted upon Ruth Dickie. Thus, even if proportionality review were a matter of constitutional concern, Breard's death sentence undoubtedly would stand.

CONCLUSION

The petition for a writ of certiorari and the motion for a stay of execution should be denied.

Respectfully submitted,

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[6] Breard's suggestion that this Court should hold his certiorari petition, pending this Court's decision in Ohio Adult Parole Authority v. Woodard, cert. granted, 117 S.Ct. 2507 (1997), is frivolous. (Ptn. 30). Unlike Breard's claim, the "due process" claim at issue in Woodard is not defaulted. Moreover, in Woodard, this Court granted the State's certiorari petition to review a aberrant court of appeals' decision that found a "due process" interest in the clemency process where no such interest previously had been recognized. This Court repeatedly has rejected death row prisoners' attempts to obtain stays of execution pending the outcome of Woodard. See, e.g., McQueen v. Sapp, 117 S.Ct. 2536 (1997); Woratzeck v. Arizona Board of Clemency, 117 S.Ct. 2500 (1997). Breard's passing reference to Woodard does not even begin to suggest how a clemency due process issue could affect a defaulted proportionality issue.

RESPONDENT'S APPENDIX

UNITED NATIONS CONFERENCE
ON CONSULAR RELATIONS

VIENNA CONVENTION
ON
CONSULAR RELATIONS

UNITED NATIONS
1964

RESP. APP. 1

TIAS 6820

BEST AVA

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations [1] concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961, [2]

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

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[1] TS 993; 59 Stat. 1031.
[2] 500 UNTS 95.

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sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

RESP. APP. 2

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MARIO B. MURPHY,
Petitioner-Appellant,

v.

J. D. NETHERLAND, WARDEN,
MECKLENBURG CORRECTIONAL CENTER,
Respondent-Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled
September 17, 1997

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QUESTIONS PRESENTED
(CAPITAL CASE)

1. (a) Does new 28 U.S.C. § 2253(c)(2), which authorizes issuance of a certificate of appealability to a habeas corpus petitioner only if he makes a substantial showing of the denial of a ***constitutional*** right, effectively divest federal courts of jurisdiction to consider a habeas petitioner's appeal based on the violation of a ***treaty***? (b) If yes, does § 2253(c)(2) violate due process or equal protection by enabling respondents — but not petitioners — to appeal the district court's adjudication of a claim based on the violation of a treaty of the United States?

2. Does Article 36(2) of the Vienna Convention on Consular Relations, which mandates that the internal laws and regulations of the United States must enable full effect to be given to the treaty's intended purposes, supervene the domestic doctrine of procedural default for habeas claims based on the violation of a right conferred by the Convention?

3. Is the failure to notify an arrested foreign national of his treaty-based right to communicate with and receive assistance from his consulate a structural error?

4. Does the doctrine of "reasonable unavailability," which provides cause to excuse a procedural default when the factual or legal basis of the claim was reasonably unavailable, excuse a default when the legal basis for the claim was contained in a treaty which was ratified by the United States in 1969, but which was so far removed from the mainstream of criminal defense law that its existence was not recognized in any criminal law treatise, published criminal law opinion, or other relevant authority until 1996?

No. 97-8214

IN THE SUPREME COURT
OF THE UNITED STATES
October 1997 Term

SUPREME COURT, U.S.
FILED
1998
OFFICE OF THE CLERK

ANGEL FRANCISCO BREARD,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONER'S BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Imminent Execution Scheduled
April 14, 1998

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Petitioner Angel Francisco Breard responds as follows to the Brief of the United States as Amicus Curiae:

1. 28 U.S.C. § 2254(a) makes collateral relief available to state prisoners who are in custody in "violation of the Constitution or laws or treaties of the United States." The Court's authority to grant collateral relief to Breard springs from Section 2254(a), not from the Vienna Convention. Therefore, the alleged lack of a remedy within the treaty itself is irrelevant to Breard's case.

2. The reason that Breard's claim based on violation of the Vienna Convention was not raised in a timely fashion is that the Commonwealth of Virginia, which had the obligation to notify Breard of his right to consular notification, did not do so in a timely fashion. It is unseemly, if not unconscionable, to make Breard bear the consequence (in this case the forfeiture of his life) of the state's dilatoriness. Reduced to its essence, the United States says that a criminal defendant or habeas petitioner must present a claim based on a failure of consular notification *before* he has been made aware of the existence of his right to consular notification. Merely to state this proposition is to illustrate its illogic. However appropriate the United States' position may be for the small number of detainees who have independent knowledge of their rights under Article 36(1) and can assert them in a timely manner, that position is irrational and unreasonable for most foreign nationals because they are in no position to protest the failure of consular notification until the receiving state informs them that a right to notification exists in the first place. For detainees like Breard, who were never notified of their right to consular notification (or who were notified only after it was too late to raise a timely claim under state law), the common-law rule of procedural bar does not "enable full effect to be given to the purpose for which the rights accorded under [Article 36(1)] are intended."

The United States misses the mark when it cites this Court's application of its procedural default jurisprudence to habeas corpus claims based on alleged violations of the United States Constitution. Congress could, if it chose, enact legislation providing that federal constitutional claims cannot be procedurally barred in habeas proceedings. It has not done so. The Vienna Convention, however, contains an express shield against the operation of procedural default when that domestic law impairs full effect from being given to specific provisions within the treaty, including the right to consular notification. The shield was part of the treaty to which the Senate consented, that the President ratified, and that is now the law of the land.

3. Citing Smith v. Murray, 477. U.S. 527 (1986), the United States suggests that the unavailability of a legal claim does not provide cause for a procedural default unless the legal basis for the claim was impossible to discover. The better interpretation of the "unavailability" exception to procedural default is contained in Reed v. Ross, 468 U.S. 1 (1984), and Coleman v. Thompson, 501 U.S. 722. Those cases require only "reasonable unavailability," meaning that compliance with the state procedural rule was "impracticable." Id. at 753.

4. The United States' "new rule" argument is the same as that raised by the habeas respondent. Even the lower court's most ardent scholars of the "new rule" jurisprudence did not find this argument persuasive, and neither should this Court. A treaty which has been the law of the land for more than a quarter of a century, which has been routinely complied with by federal law enforcement officials, and which has mandated consular notification for all detained foreign nationals from signatory countries is simply not a "new rule."

The consular notification provision was unavailable to Breard because of its obscurity, not because of its actual novelty. It was buried in a small number of legal authorities that explained or analyzed diplomatic or immigration law. Breard had no diplomatic status, and his immigration problems, if any, were not the proper concern of the lawyers appointed to defend him on charges of capital murder.[1]

CONCLUSION

For the reasons stated above, Petitioner Angel Francisco Breard respectfully requests that his Application for a Stay of Execution be granted.

Respectfully submitted,

ANGEL FRANCISCO BREARD

By Counsel

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[1] If Breard's defense counsel had asked the state court for permission to incur the cost of researching diplomatic and immigration law, based on nothing more than speculative hope that they might find something to assist their client because he was a foreign national, there is no doubt that the state court would have denied the request.

CERTIFICATE

I certify that a copy of the foregoing was faxed and hand-delivered to Donald R. Curry, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, and faxed to Seth P. Waxman, Esquire, Solicitor General of the United States, Office of the Solicitor General, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 on April ___, 1998.